(1) Supreme Court, U.S.
FILED

03 380 JUL 2 2003

No. 03- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MANUEL DAVILA,

Petitioner,

v.

DELTA AIRLINES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MANUEL DAVILA
Petitioner, Pro Se
P.O. Box 17501
Plantation, FL 33318
(305) 477-3484

182827

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

32pp

QUESTION PRESENTED

Whether the Eleventh Circuit erred when holding that an ADA claim was barred by the doctrine of res judicata when Petitioner could not have obtained the right to sue letter from the EEOC because the case was held in abeyance, when the RLA arbitration appeal was a separate and distinct proceeding limited to the record developed in the arbitration proceedings, when the District Court had dismissed the arbitration appeal due to a lack of subject matter jurisdiction and then amended its decision sua sponte three years later and when the Eleventh Circuit decision conflicts with other Circuits.

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit (App. A) is in a published decision to wit *Manuel Davila v. Delta Airlines Inc.*, Case No. 02-13767 The district court (App. B) opinion and judgment is unreported to wit: *Manuel Davila v. Delta Airlines Inc.*, Case No.: 02-60194-CIV-WILLIAM M. HOEVELER.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on April 3, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the American with Disabilities Act as amended (ADA), 42 U.S.C. § 12112.

42 U.S.C. § 12112 states in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

STATEMENT OF THE CASE

Petitioner was terminated as a Delta pilot due to a disability in that he has a permanent physical impairment (degenerative back disease), and thus have a disability as defined by the ADA. The only reason for plaintiff's termination is that Delta knew he had a degenerative permanent lower back condition which would require him medical care from time to time. The reason for his termination was pretexual to mask the real reason, discrimination due to his back condition.

A. Proceeding Below

Petitioner Davila filed this complaint in State Court which was removed based upon a federal question to the United States District Court for the Southern District of Florida (Hoeveler) alleging an ADA violation and breach of contract. Subject matter jurisdiction over the action was invoked pursuant to 24 U.S.C. § 12117(a) and 28 U.S.C. §§ 1331 and 1343. (R 1-1) The Appellee moved to dismiss and Petitioner moved to amend the amended complaint. The motion to dismiss was granted and the motion to amend was denied on June 10, 2002. The decision was appealed and on April 3, 2003, the Court of Appeals for the Eleventh Circuit issued a decision and order affirming the District Court decision. App. A at 1a-13a.

The basis for granting the motion to dismiss was res judicata since petitioner had previously had filed an appeal of arbitration award by a petition in the United States District Court for the Southern District of Florida (Hoeveler) to seek review of an arbitration award of the Delta System Board of Adjustment under the Railway Labor Act. It should be noted that the petitioner had not yet received a right to sue letter and had not even filed an EEOC charge because the EEOC although taking the initial information placed the case in suspense until the conclusion of the arbitration proceeding. Thus, it was not jurisdictionally possible to pursue the ADA claim.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Eleventh Circuit Court Of Appeals Conflicts With The Decision Of The Supreme Court And With Other Circuits

The Court below granted the defendant's motion to dismiss despite the fact that the Court had previously ruled in 1999 that it had no subject matter jurisdiction to review an arbitration award. The Court stated that the order was improperly characterized as lacking subject matter jurisdiction. As a result, since Petitioner could have brought the ADA claim on a RLA arbitration appeal, despite the fact that Petitioner did not file an EEOC charge filed yet since it was stayed by the EEOC and did not have a right to sue, the ADA claim was barred by res judicata.

The doctrine of res judicata, or claim preclusion will bar a subsequent action: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same. *Jang v. United Techs Corp.*, 951 F.3d 1147, 1149 (11th Cir. 2000); *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265 (11th Cir. 2002).

Even if the Court had the power to amend its prior order and judgment, there is no res judicata. First, the causes of actions are not the same. A petition to review an arbitration decision which is dismissed due to a lack of subject matter jurisdiction is not the same causes of action as an ADA claim. Put simply, the causes of action are materially different. In the case at bar, there is no identity of the thing being sued for and identity of causes of action since the ADA case was a civil rights case with completely different elements of proof including discriminatory intent than an appeal of an arbitration decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 37 L. Ed. 2d 668 (1973).

Second, the ADA claim could not have been brought since the right to sue letter had not been issued nor could it be issued since the Petitioner was advised that the EEOC proceeding was stayed. The EEOC had advised Petitioner that it would stay the proceedings and take absolutely no action until the arbitration process was completed. Once the arbitration proceeding was completed, the EEOC would open its investigation for the first time. In fact, when Petitioner advised the EEOC of the completion of the arbitration process, it for the first time filed the actual charge of discrimination and began the EEOC investigatory process.

Thus, there was not a full and fair opportunity to litigate the issue in the prior lawsuit. In sum, Petitioner could not have brought the ADA claim without the right sue letter which it did not have nor could not obtain until the completion of the arbitration appeal process.

Moreover the decision below cannot be reconciled with other cases directly on point in other circuits when deciding whether a federal judgment has a claim preclusive effect. The following cases stand for the proposition that there must be a full and fair opportunity to litigate the issue in the prior lawsuit. *Del. River Port Authority v. FOP Renn-Jersey Lodge 30*, 290 F.3d 567 (3d Cir. 2002); *Maxim v. Dalton*, 48 F.3d 1228 (9th Cir. 1995); *Richardson v. The County of Merced*, 921 F.2d 281 (9th Cir. 1990); *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191 (5th Cir. 1988); and *Hill v. Coca Cola Bottling Co.*, 786 F.2d 550 (2d Cir. 1986). In the instant case, the Eleventh Circuit abandons that position since it was not possible to litigate the ADA claim at the time the petition was brought under the Railway Labor Act. There holding directly conflicts with the other Circuits.

II. The Questions Presented Are Important

The questions presented are important. Further clarification regarding the circumstances of when an employee must bring a discrimination claim in Court is critical. The Eleventh Circuit appears to follow a standard that it does not matter if the discrimination claim is not ripe and cannot be brought due to jurisdictional reasons, as long as there is any employment dispute in court, even on the very narrow basis of an RLA appeal of an arbitration, the claim still must be brought or it is barred in the future.

III. The Decision Of The Court Of Appeals Has A Particularly Debilitating Effect On Disabled Employees

The Eleventh Circuit holding has a particularly debilitating effect on disabled employees. The procedure of being required to file an ADA claim even when it is not ripe on RLA arbitration appeal in effect negates the right to bring the claim at all. The petition to review the arbitration decision had to be made due to the statute of limitations. However, the ADA charge of discrimination was not ripe and it was not possible to bring that claim when the arbitration appeal was heard.

CONCLUSION

For the reasons set for above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MANUEL DAVILA
Petitioner, Pro Se
P.O. Box 17501
Plantation, FL 33318
(305) 477-3484